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# **The Internal Market and National Security: Transposition, Impact, and Reform of the EU Directive on Intra-Community Transfers of Defence Products**

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## **Abstract**

*Whilst the Internal Market has been operational for decades, the free movement of defence products within the EU has been restricted by national licencing practices. Member States have treated “intra-EU” transfers as equivalent to third country exports. The Intra-Community Transfers Directive (ICT) introduced a harmonised transfer regime. This article provides a first legal analysis and a case study of the challenges facing harmonisation where an evolving Internal Market competence meets a diversity of national security and other interests. The ICT constitutes a significant first step towards reducing barriers to trade but an ambivalent approach to minimum harmonisation has impacted its effectiveness; legal reform is required to further this objective.*

## **1. Introduction**

Member States have historically restricted the free movement of defence products within the EU. Law and practice in this field appears to operate in a parallel universe in which the Internal Market does not exist. National licencing laws and policies have treated ‘intra-Union’ transfers, that is, the transmission or movement of a defence-related product from a supplier in one Member State to a recipient in another,<sup>1</sup> as equivalent to exports to third countries outside the EU. A principal concern is that the absence of controls on transfers within the EU could exacerbate risks of illicit exports outside the EU, threatening national security and foreign policy. Disproportionate licencing requirements have incurred significant costs and delays, creating barriers to trade. However, in 2009, the EU adopted its “Defence Package”, a key component of which is the Intra-Community Transfers Directive (ICT) 2009/43/EC introducing a harmonised transfer licencing and certification regime.<sup>2</sup>

This article addresses an important gap in existing literature by offering a legal analysis of the ICT.<sup>3</sup> It also argues that recent proposals for further harmonisation through

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<sup>1</sup> Based on the definition of ‘transfer’ in Article 3(2) Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community [2009] OJ L146/1. Post-Lisbon, ‘Union’ should be substituted for ‘Community’.

<sup>2</sup> The “Defence Package” consists of: the ICT; Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security; and amending Directives 2004/17/EC and 2004/18/EC [2009] OJ L216/76 and *A Strategy for a Stronger and More Competitive European Defence Industry* COM (2007)764 final. See Trybus, *Buying Defence and Security in Europe: the EU Defence and Security Procurement Directive in Context* (CUP, Cambridge 2014); and Heuninckx, “The EU Defence and Security Procurement Directive: Trick or Treat?” (2011) 20 PPL Rev 9. For an overview of the ICT in a legal context, see Trybus, *Buying Defence and Security in Europe*, *ibid.*, at 139-156.

<sup>3</sup> For the political science/security studies literature, see Masson, Marta, Léger and Lundmark, “The “Transfer Directive”: perceptions in European countries and recommendations”, *Fondation pour la recherche stratégique*, No. 04/2010; Mölling, “Options for an EU regime on intra-Community transfers of defence goods” in Keohane (ed.), *Towards a European Defence Market*, Chaillot Paper 113 (EU Institute of Security Studies: Paris, 2008) and Ingels, “The Intra-EU Defence Trade Directive: Positive Goals” in Bailes, Depauw and Baum (eds.) *The EU Defence Market: Balancing Effectiveness with Responsibility* (Flemish Peace Institute: Brussels, 2011).

“soft-law” Recommendations are insufficient and that legal reform of the ICT is necessary to enable minimum harmonisation. This argument is made in light of a recent Commission-authorized study tasked to assess the ICT’s impact, which concluded that, whilst widespread variable implementation has limited the Directive’s impact in practice, there is no strong interest among authorities and industry for legal reform and that further harmonisation should be pursued through soft-law guidance.<sup>4</sup> In late 2016, the Commission published a Communication based largely on this study adopting two Recommendations for further harmonisation which do not, however, entail legal reform.<sup>5</sup> This article begins by examining transfers in their historical economic, political and legal context (Section 2).<sup>6</sup> It then analyses the ICT’s scope (Section 3), transfers and licences (Section 4), end-use controls (Section 5), and certification (Section 6)<sup>7</sup> before offering conclusions (Section 7).

## 2. Context

The defence industries of several EU Member States are part of a global armaments market in which, in 2014, the top 100 defence producers sold goods and services worth US\$401 billion.<sup>8</sup> Companies in the so-called ‘Big Six’ Member States, namely France, Germany, Italy, Spain, Sweden and the UK, sell to their respective governments, to a lesser extent to other Member States, and export to third countries.<sup>9</sup> Further, most Member States have at least niche capacities and participate in European and global supply chains. Therefore, the

<sup>4</sup> Commission, *Evaluation of Directive 2009/43/EC on the Transfers of Defence-Related Products within the Community Final Report* (prepared by Technopolis) June 2016 (published 7 October 2016) (hereinafter ‘*Technopolis*’), in particular, at 73. The authors were interviewed for this Report: Appendix E, 102, Table 39.

<sup>5</sup> See Report from the Commission to the European Parliament and the Council: *Evaluation of Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community* COM(2016) 760 final (30.11.2016); Commission Recommendation of 30.11.2016 on the harmonisation of the scope and conditions for general transfer licences for armed forces and contracting authorities as referred to in point (a) of Article 5(2) of Directive 2009/43/EC of the European Parliament and of the Council C(2016) 7711 final; and Commission Recommendation of 30.11.2016 on the harmonisation of the scope of and conditions for general transfer licences for certified recipients as referred to in Article 9 of Directive 2009/43/EC of the European Parliament and of the Council C(2016) 7728 final. The Commission Staff Working Document SWD(2016) 398 final/2 (7.12.2016) accompanying COM(2016) 760 final does not go beyond the findings of *Technopolis*, *ibid*.

<sup>6</sup> Drawing on: UNISYS, ‘Intra-Community Transfers of Defence Products’, Final Report of the Study ‘Assessment of Community initiatives related to intra-community transfers of defence products’, Brussels, February 2005 (for the European Commission) (hereinafter ‘*UNISYS*’) (no longer publicly available but retained on file); and Commission Staff Working Document, Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on simplifying terms and conditions of transfers of defence-related products within the Community (hereinafter ‘*Impact Assessment*’), SEC(2007), 1593.

<sup>7</sup> Informed by Report from the Commission to the European Parliament and the Council on transposition of Directive 2009/43/EC simplifying terms and conditions for transfer of defence-related products within the EU, COM(2012) 359 final (hereinafter ‘*Transposition Report*’); Mampaey, Moreau, Quéau and Seniora, Final Report, *Study on the Implementation of Directive 2009/43/EC on Transfers of Defence-related Products*, Group for Research and Information on Peace and Security (GRIP) (prepared for the European Commission) 2014; European Parliament Directorate-General for External Policies Policy Department’s Report – *The impact of the ‘defence package’ Directives on European Defence* 2015; *Technopolis*, *supra* note 4, and SWD(2016) 398 final/2. Information was also collected during semi-structured interviews conducted with Mr Ian Bendelow, UK Department for Business, Innovation and Skills and informal discussions with German officials.

<sup>8</sup> Stockholm International Peace Research Institute (SIPRI) Press Release, 14 December 2014: <http://www.sipri.org/media/pressreleases/2014/SIPRI-Top-100-December-2014> [last visited 30 January 2017]. The list contains many EU-based companies. The European defence industries have an estimated annual turnover of €55 billion and employ approximately 300,000 people. See also 2007 figures in COM (2007)764 *supra* note 2, at 2, also indicating that 20 years ago these figures were almost twice as high.

<sup>9</sup> For a discussion of this grouping, see Trybus, *Buying Defence and Security in Europe*, *supra* note 2, at 26.

ability to transfer defence products expeditiously with proportionate controls is an important contributor to the competitiveness and, indeed, survival of the European defence industries.

### 2.1. *The status quo ante: intra-Union transfers prior to the ICT*

For many years, the Commission has sought to prioritise intra-Union transfers as part of the development of a more competitive EU defence market.<sup>10</sup> However, there had been no general EU-wide regime for the intra-Union transfer of defence-related products.<sup>11</sup> Member States instituted their own national laws and policies, which formally treated intra-EU transfers and third country exports without distinction.<sup>12</sup> National *ex ante* export licences would be required in both instances.<sup>13</sup> To this extent, national rules were not specifically adapted to differentiate Internal Market law obligations and any other legal obligations with regard to exports. Thus, measures that might otherwise be appropriate for export risks, such as potential diversion to third parties involved in conflict or terrorism, were equally applied to transfers to allied and generally peaceful Member States within an integrated EU. This absence of free movement was criticised not least by the European defence industries.<sup>14</sup>

Whilst licence applications for export to other EU or NATO members were most likely subject to less scrutiny than exports to other countries,<sup>15</sup> the formal existence of many different laws was, in itself, “a serious burden for intra-[Union] transfers” exacerbated by their publication alongside licencing policies (if published) in different languages.<sup>16</sup> Further, Member States used different national and international lists for the control of armaments to determine the scope of coverage of licences.<sup>17</sup> Most national laws did not specify detailed or transparent licencing criteria.<sup>18</sup> Determinations were, therefore, at the absolute discretion of licencing authorities.<sup>19</sup> Moreover, certain national laws required that additional (pre-)licences be obtained or a fee paid before licences could be approved.<sup>20</sup> The processes for certifying reliable defence companies also varied.<sup>21</sup> Finally, licences could be obtained for several years covering multiple shipments or required for every single shipment.<sup>22</sup> Time limits for licence expirations also varied.<sup>23</sup> Resulting administrative burdens generated long lead times up to several months.<sup>24</sup> Even companies transferring components between subsidiaries located in several countries had to comply with variable regimes.<sup>25</sup> It is difficult to assess the indirect costs of controls on the defence industries overall, but the direct costs amount to hundreds of millions of Euros.<sup>26</sup> These costs are stark considering that in 2003, out of 12,627 licence

<sup>10</sup> COM(1996) 10 final, at 19; COM(1997) 583 final, Annex I, Art.5; Annex II; and COM(2003) 113 final, at 13.

<sup>11</sup> By contrast, see Council Regulation 428/2009/EC setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (recast) [2009] OJ L134/1.

<sup>12</sup> *Impact Assessment*, *supra* note 6, at 4 and most recently COM(2016) 760 final, at 3.

<sup>13</sup> *UNISYS*, *supra* note 6, at 12; *Impact Assessment*, *ibid.*, at 13.

<sup>14</sup> See the President of the European Defence Industries Group Corrado Antonini: “Political Harmonisation and Consolidation”, EMP conference on the Future of the European Defence Industry, Brussels, 10-11 December 2003 as cited in *UNISYS*, *ibid.*, at 80.

<sup>15</sup> Masson, Marta, Léger, and Lundmark, ‘The “Transfer Directive”’, *supra* note 3, at 18. For a useful analysis of national licencing regimes prior to the ICT, see *ibid* 15-32 and *UNISYS*, *supra* note 6, at 8-36 and Annex D.

<sup>16</sup> *UNISYS*, *ibid.*, at 12 also at 59 and 64.

<sup>17</sup> *UNISYS*, *supra* note 6, at 9. See also: Mölling, *supra* note 3, at 58.

<sup>18</sup> *UNISYS*, *ibid.*, at 61.

<sup>19</sup> *Impact Assessment*, note 6, at 14.

<sup>20</sup> *UNISYS*, *supra* note 6, at 61; *Impact Assessment*, *supra* note 6, at 14.

<sup>21</sup> Mölling, *supra* note 3, at 59.

<sup>22</sup> *UNISYS*, *supra* note 6, at 62.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*, at 5; *Impact Assessment*, *supra* note 6, at 14 and Mölling, *supra* note 3, at 61-62, 68.

<sup>25</sup> *Impact Assessment*, *supra* note 6, at 4.

<sup>26</sup> *UNISYS*, *supra* note 6, at 112 estimates the indirect costs at €2.73 billion. The estimated direct costs for the 12,627 licence procedures conducted in 2003 amounted to €238 million (*ibid.*).

applications,<sup>27</sup> only 15 were refused, all in the Baltic States.<sup>28</sup> Whilst, as will be discussed in Section 4, licencing measures may exceptionally be justified, the above indicates that licencing practices have generally been disproportionate to control needs.<sup>29</sup>

Some momentum towards liberalisation resulted from the 1998 intergovernmental Letter of Intent (LoI) initiative, to which the ‘Big-Six’ defence industrial Member States are currently signatories.<sup>30</sup> Attempts had been made to introduce the ‘Global Project Licence’ removing the need for specific authorisations to transfer products between LoI partners participating in collaborative projects.<sup>31</sup> However, the LoI initiative has not been fully executed in practice and with limited results to date.<sup>32</sup> In 2006, the EU launched a *Consultation Paper* on intra-Community transfers.<sup>33</sup> This precipitated the 2007 *Impact Assessment*<sup>34</sup> and proposal for a Directive.<sup>35</sup> The *status quo* was rejected. The Commission opted for a Directive rather than a Regulation based on the “primary responsibility” of Member States for simplification of licencing and the general sensitivity of defence.<sup>36</sup> On 6 May 2009, the ICT was adopted. Member States had until 30 June 2011 for transposition: Article 18(1) ICT. However, national provisions did not have to enter into effect until 30 June 2012, allowing a period in which to “foster mutual trust” and evaluate progress based on a Commission report.<sup>37</sup> In 2012, the Commission reported incomplete transposition<sup>38</sup> and initially launched infringement proceedings against seven Member States.<sup>39</sup> However, despite these delays, all Member States have now formally transposed the ICT.<sup>40</sup>

## 2.2. Competence to regulate armaments and harmonisation under the TFEU

As transfers of defence products may implicate national security and foreign policy, central issues are the EU’s competence to act and the nature and scope of harmonisation in this field.

### 2.2.1. Competence

The ICT was adopted under Article 114 TFEU (then 95 EC) which enables EU legislation that harmonises relevant national laws for the establishment and functioning of the Internal Market.<sup>41</sup> Harmonisation is conventionally understood as the institution of common EU rules to remove ‘lawful’ barriers to trade, that is, nationally diverse measures which are *prima facie* incompatible with the TFEU but which could exceptionally be justified e.g. on public health

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<sup>27</sup> With an overall value of €8.9 billion for conventional defence products delivered between the then 25 EU Member States: *UNISYS*, *supra* note 6, at 94. This represents approximately 31.4 per cent of all transfers, with the remainder being exports to third countries: *ibid.*, 95.

<sup>28</sup> *UNISYS*, *ibid.*, at 94: six in Estonia, six in Latvia and three in Lithuania.

<sup>29</sup> *Impact Assessment*, *supra* note 6, at 4 and 13.

<sup>30</sup> Letter of Intent between the Defence Ministers of the UK, France, Germany, Italy, Spain and Sweden on Measures to facilitate the Restructuring of the European Defence Industry signed in London, 6 July 1998. The LoI was formalised under a Framework Agreement (FA) which entered into force on 2 October 2003. For a general discussion of the LoI, see Trybus, *Buying Defence and Security in Europe*, *supra* note 2, at 225-231.

<sup>31</sup> Article 7 LoI FA.

<sup>32</sup> *Impact Assessment*, *supra* note 6, at 9 and 18.

<sup>33</sup> Commission, Consultation Paper on the Intra-Community Circulation of Products for the Defence of Member States, 21 March 2006, Brussels, ENTR/C.

<sup>34</sup> *Supra* note 6.

<sup>35</sup> *Proposal*, COM(2007) 765 final.

<sup>36</sup> COM(2007) 765 final, at 8.

<sup>37</sup> See Recital 40 and Articles 17(1) and 18(1) ICT.

<sup>38</sup> The *Transposition Report*, *supra* note 7, at 15-19 reported in 2012 that 20 Member States had fully transposed, one had partially, six were expectant and one had not communicated transposition.

<sup>39</sup> *Transposition Report*, *ibid.*, at 5.

<sup>40</sup> See: COM(2016) 760 final, at 2 and SWD(2016) 398 final/2, at 14. Croatia joined the EU only in 2013.

<sup>41</sup> Preamble and Recital 43 ICT.

or security grounds.<sup>42</sup> If a harmonisation Directive is enacted to provide rules which protect such interests, recourse to such grounds is precluded.<sup>43</sup> If harmonisation is not complete, however, Member States may continue to have recourse to those grounds.<sup>44</sup>

It is clear that defence-related products are goods for the purposes of EU law.<sup>45</sup> Onerous licencing requirements may constitute measures having equivalent effect to quantitative restrictions on exports contrary to Article 35 TFEU.<sup>46</sup> The ICT considers harmonisation to be necessary because “direct” application of the free movement principles alone is insufficient to remove national restrictions in light of their potential to be justified under Article 36 or 346 TFEU.<sup>47</sup> In other words, the ICT recognises the reality that licencing measures remain, in principle, justifiable on public security and/or essential national security grounds in exceptional circumstances.<sup>48</sup> However, it seeks to progressively eliminate certain licencing measures which do not justify exclusion from EU Internal Market principles through a uniform minimum EU licencing regime. This does not preclude Member States from continuing to rely on exceptions within the ICT which limit its application based on such security grounds, Article 36 TFEU to deviate from the ICT, or exempt other national licencing measures from free movement principles under Internal Market law. Nor does it preclude derogation from the TFEU altogether pursuant to Article 346 TFEU. This provides a degree of flexibility necessary to balance sensitive security interests against the discipline of the Internal Market. The onus is now firmly on Member States to justify why those interests cannot be sufficiently protected within the scope of the ICT, which properly acknowledges the application of free movement principles to licencing of defence products.

However, outstanding questions remain. Firstly, whilst the ICT indicates that licencing measures have the “potential” to be justified, prior CJEU case law had not provided a clear indication as to what kinds of measure can be justified under Article 36 TFEU and the level of scrutiny to be applied. It is, perhaps, surprising that Member States and suppliers have not previously challenged the compatibility of national licencing measures with EU law on this basis. So far, EU case law has only indicated that licencing measures applicable to the import, export and transit of dual-use goods could be justified on grounds of public security.<sup>49</sup> Secondly, the fact that, unusually, the ICT seeks to harmonise national measures justified not only under Article 36 TFEU within the scope of the Treaty but also under Article 346 TFEU outside the Treaty altogether, raises questions as to the form and level of judicial scrutiny that will be applied by the EU courts to national licencing measures taken under Article 346 TFEU. Prior to the ICT, Member States considered that measures concerning armaments, including licencing in relation to transfers, were automatically and categorically excluded from the TFEU under Article 346 TFEU<sup>50</sup> on the basis that such measures affect Member States’ essential security interests.<sup>51</sup> The justifiability of those measures under Article 36

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<sup>42</sup> Alternatively, on the basis of the ‘*Cassis de Dijon*’ mandatory requirements or overriding public interest grounds as recognised in *REWE Zentrale AG v. Bundesmonopolverwaltung für Branntwein* (Case 120/78) [1979] ECR 649, [1979] 3 CMLR 494 and subsequent case law.

<sup>43</sup> *Commission v. Ireland*, (‘*Campus Oil*’) (Case 72/83) [1984] ECR 2727, para.21.

<sup>44</sup> *Denkavit Futtermittel GmbH v. Land Baden-Württemberg* (C-39/90) [1991] ECR I-3069, para.19.

<sup>45</sup> Recital 2 ICT. See also *Commission v. Italy* (‘*Arts Treasures*’) (Case 7/68) [1968] ECR 423, 429.

<sup>46</sup> *Consultation Paper*, *supra* note 33, at 3 and COM(2007) 765 final *supra* note 35, at 19.

<sup>47</sup> Recitals 2 and 5 ICT.

<sup>48</sup> Recitals 5, 13 and Article 1(3) ICT.

<sup>49</sup> *Criminal Proceedings against Aimé Richardt and Les Accessoires Scientifiques SNC* (C-367/89) [1991] ECR I-4621; *Fritz Werner Industrie-Ausrüstungen GmbH v. Germany* (C-70/94) [1995] ECR I-3989 and *Criminal Proceedings against Peter Leifer* (C-83/94) [1995] ECR I-3231.

<sup>50</sup> Whilst difficult to empirically validate, this assessment was made by *UNISYS*, *supra* note 6, at 70-72 and the *Impact Assessment*, *supra* note 6, at 19.

<sup>51</sup> Article 346(1)(b) TFEU: “[...] any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms,

TFEU does not appear to have been fully addressed. In the related field of defence procurement, the CJEU continues to refine its general interpretation that Article 346 TFEU does not represent an automatic or categorical exclusion of trade in defence products from the otherwise applicable TFEU.<sup>52</sup> Similar to the free movement exceptions such as Article 36 TFEU, Article 346 TFEU is subject to a narrow interpretation.<sup>53</sup> Member States must specifically invoke Article 346 TFEU and prove that a situation justifying its use exists. In the Commission's view, it is not possible to infer from Article 346 TFEU a general proviso inherent in the TFEU covering all measures taken by Member States and that it has no effect on its legislative power to adopt harmonising legislation concerning defence product transfers.<sup>54</sup> Notwithstanding, this leaves unresolved the issue of the extent of deference to be shown by the EU courts to national licencing measures which are *prima facie* incompatible with the ICT in light of this politically sensitive context. Whilst it is beyond the scope of this article to address these questions of EU constitutional law, they further expose longstanding uncertainty regarding the proper relationship between Article 36 and 346 TFEU.

In any event, it is questionable whether the legal basis for harmonisation or the compatibility of the ICT with the TFEU would be challenged. Member States have not signalled any indication that the ICT is an encroachment on their competences. Further, the choice of a Directive is consistent with EU legal approaches to licencing and transfers in related areas e.g. firearms and explosives for civil use.<sup>55</sup> The ICT also mirrors calls for action to regulate transfers of dual-use goods i.e. goods for military and civil purposes. A EU dual-use Regulation establishes a common set of EU rules for the export of dual-use goods but which has been criticised because it continues to enable Member States to impose restrictive controls on intra-EU transfers of dual-use goods; the ICT is identified as a potential model on which to base future harmonisation.<sup>56</sup> On balance, it is better to have a Directive that uses EU measures to reduce the effect of lawful restrictions than leave restrictive national measures in

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munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes [...]" In 1958, the Council compiled a list of armaments to which Article 346(1)(b) TFEU applies. See Council Decision 298/58 of 15 April 1958 (not published). On Article 346 TFEU: Trybus, *Buying Defence and Security in Europe*, *supra* note 2, at 87-128; Koutrakos, "The Application of EC law to Defence Industries—Changing Interpretations of Article 296 EC" in Barnard and Odudu (eds.), *The Outer Limits of European Union Law* (Hart: Oxford, 2009), at 307-328 and Pourbaix, "The Future Scope of Application of Article 346 TFEU" (2011) 20 PPL Rev 1-8.

<sup>52</sup> *Commission v. Spain* (C-414/97) [1999] ECR I-5585, [2000] 2 CMLR 4. This interpretation was reiterated in Commission, 'Interpretative Communication on the Application of Article 296 of the Treaty in the field of defence procurement' (Communication) COM(2006) 779 final. This position has been confirmed and further refined in subsequent judgments: *Agusta* judgments (*Commission v. Italy* (C-337/05) [2008] ECR I-2173 and *Commission v. Italy* (C-157/06) [2008] ECR I-7313); the *Military Exports* judgments (*Commission v. Finland* (C-284/05) [2009] ECR I-11705; *Commission v. Sweden* (C-294/05) [2009] ECR I-11777; *Commission v. Italy* (C-387/05) [2009] ECR I-11831; *Commission v. Greece* (C-409/05) [2009] ECR I-11859; *Commission v. Denmark* (C-461/05) [2009] ECR I-11887; *Commission v. Portugal* (C-38/06) [2010] ECR I-1569; *Commission v. Italy* (C-239/06) [2009] ECR I-11913) and *Finnish Turntables* (*Insinööritoimisto InsTiimi Oy* (C-615/10) ECLI:EU:C:2012:324, and most recently in *Ellinika Nafpigeia* (C-246/12 P), ECLI:EU:C:2013:133, and *Schiebel Aircraft* (C-474/12) ECLI:EU:C:2014:2139.

<sup>53</sup> *Johnston* (Case 222/84) [1986] ECR 1651, [1986] 3 CMLR 240, para. 26. See also *Salgoil* (Case 13/68) [1968] ECR 453, at 463, [1969] CMLR 181, 192 and *Commission v. Italy* (Case 7/68) [1968] ECR 633, at 644.

<sup>54</sup> *Impact Assessment*, *supra* note 6, at 19-20 citing AG La Pergola in *Sirdar* (C-273/97), ECLI:EU:C:1999:246.

<sup>55</sup> Council Directive 91/477/EEC on control of the acquisition and possession of weapons [1991] OJ L 256/51 and Council Directive 93/15/EEC on the harmonization of the provisions relating to the placing on the market and supervision of explosives for civil uses [1993] OJ L 121/20. The ICT is without prejudice to these Directives. See Recital 15 ICT.

<sup>56</sup> Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items [2009] L 134/1. This Regulation requires controls on the transfer of certain items listed in Annex IV: Articles 2(11) and 22. See COM(2011) 393 final, at 18-19.

place unharmonised. Member States no longer need to introduce or maintain other restrictions unless exceptionally required by Articles 36 or 346 TFEU.<sup>57</sup>

### 2.2.2. *Nature and scope of harmonisation*

The key purported objective of harmonisation is to simplify intra-Union transfers.<sup>58</sup> However, it is questionable to what extent the ICT achieves substantive minimum harmonisation. Simplification may address the complexity of national licencing measures by standardising the types of permissible licence. However, this does not address other equally, if not more, restrictive trade barriers, a prime example being restrictive licencing conditions, the national diversity of which was criticised in Section 2.1. This issue is compounded by the fact that the ICT does not fully address the underlying causes of complexity and diversity. Short of the EU adopting EU-wide comprehensive policies to coordinate *both* the transfer and export of defence products, the ICT's default position is largely to accommodate rather than systematically address these concerns through its provisions. An important limitation of the ICT's scope is that harmonisation of transfer rules and procedures is said to be without prejudice to Member States' policies regarding transfers;<sup>59</sup> international obligations or commitments;<sup>60</sup> and policies on the export of defence-related products.<sup>61</sup> Consequently, as will be discussed in Section 4, Member States retain considerable discretion to determine the terms, conditions and products applicable for each type of licence including third country export limitations; the latter remains a key organising construct of the ICT which conditions its application.<sup>62</sup> Therefore, the simplification to be achieved through standardised licencing is undermined by the continuing diversity of national approaches on these key issues. A revised ICT should identify more clearly its harmonisation objectives and their scope.

The ICT is also equivocal with regard to its scope of coverage concerning "intergovernmental cooperation" broadly construed but undefined in the ICT. As will be discussed in Section 4.3.1, the ICT permits rather than requires publication of a general licence for the purposes of participation in an "intergovernmental cooperation programme".<sup>63</sup> However, as will be discussed in Section 4.3.3, Member States may exempt from licencing transfers necessary for the implementation of a "cooperative armament programme between Member States".<sup>64</sup> Further, a Member State or the Commission at their own initiative may seek to amend the ICT to also exempt a transfer necessary for "intergovernmental cooperation" as referred to in Article 1(4).<sup>65</sup> Article 1(4) provides that the ICT does not affect the possibility for Member States to pursue and further develop intergovernmental cooperation, whilst complying with the ICT.<sup>66</sup>

Therefore, on the one hand, the LoI identified in Section 2.1 could continue to provide an independent framework for more detailed licencing measures thereby potentially

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<sup>57</sup> Recital 13 ICT.

<sup>58</sup> Recitals 6 and 43 and Article 1 ICT. See Recital 3 ICT referring to the more general objectives of removing disparities which may distort competition and hamper innovation, industrial cooperation and competitiveness.

<sup>59</sup> Recital 6 ICT.

<sup>60</sup> Recital 7 ICT.

<sup>61</sup> *Ibid.* and Article 1(2) ICT. See also Recital 30 ICT referring to Member State cooperation within the framework of Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment [2008] OJ L 335/99. See also SWD(2016) 398 final/2, at 24.

<sup>62</sup> The number of references to exports in the Recitals are alone indicative. See Recitals 4, 7, 12, 27, 28, 29, 30, 31, 33, 34, 35 and 36 ICT. See also *GRIP*, *supra* note 7, at 60.

<sup>63</sup> Article 5(3) ICT. "Intergovernmental cooperation programme" is not defined.

<sup>64</sup> Article 4(2)(c) ICT. Similarly, "Cooperative armament programme" is not defined.

<sup>65</sup> See Recital 16 ICT and Article 4(3)(c) ICT.

<sup>66</sup> See also Recital 8 ICT. "Intergovernmental cooperation" is not defined.



influencing the future development of the ICT regime.<sup>67</sup> On the other hand, the co-existence of intergovernmental and supranational licencing regimes in a “two-speed” Europe may not be sustainable. The LoI *acquis* has already been largely transferred to the EU in light of the EU’s exercise of competences in the field of defence trade.<sup>68</sup> Further, certain Member States may argue that licencing measures adopted under frameworks outside the ICT to which they are not party may be discriminatory, a risk identified as a particular reason for introducing the ICT.<sup>69</sup> A revised ICT should clarify its coverage regarding intergovernmental cooperation.

### 3. General coverage

The ICT applies to defence-related products: Articles 2 and 3(1) ICT. These are set out in an Annex which must correspond to the EU Common Military List (“CML”)<sup>70</sup> adopted in the context of Council Common Position 2008/944/CFSP for defence exports.<sup>71</sup> Article 13(1) ICT requires the Commission to update the Annex to strictly correspond to the CML and which has, to date, already been amended three times.<sup>72</sup> This is intended to address the criticism of the variable use of national lists discussed in Section 2.1. However, the ICT’s harmonisation-through-simplification objective has thus already been compromised. Whilst the Annex should be identical to the CML at all times, for most of the year it has not fully corresponded because the procedure for amending and transposing the Annex has taken at least seven months.<sup>73</sup> The Commission therefore rightly considers it necessary to simplify the procedure for aligning the Annex and CML,<sup>74</sup> but is yet to “examine options to simplify and speed up annual updates”.<sup>75</sup>

The 2016 *Evaluation Report* makes no concrete proposal for an amendment; rather it contemplates a “limited revision of the Directive, e.g. by separating the Annex from the Directive and by annual adoption of the updates by Commission decision”.<sup>76</sup> This is the only aspect of the ICT for which the Commission discusses a ‘hard law’ amendment in the short term as opposed to the revision of certain of the ICT’s other provisions in the “longer run”.<sup>77</sup> However, the *Evaluation Report* appears obscure and opaque on this issue.<sup>78</sup> It could be assumed that the Commission is suggesting that the Annex should be separated from the Directive as a stand-alone document to be periodically amended by a Commission Decision. Yet, it is not entirely clear how this will reduce delay and improve coherence.

Moreover, the two Commission Recommendations published with the 2016 *Evaluation Report* are relevant here. As will be discussed in Section 4.3.2. below, contracting authorities have excluded certain products from falling within the scope of general transfer licences thereby limiting their harmonising potential. By contrast, the Recommendations contain “a minimum set of less sensitive defence related products and components” to be

<sup>67</sup> The authors are grateful to Mr. Ian Bendelow for discussions on the LoI’s continuing lead role.

<sup>68</sup> The relevant Sub-Committee recognises the EU’s competence to regulate intra-Union transfers.

<sup>69</sup> *Impact Assessment*, *supra* note 6, Table of Comparison of Options at 44.

<sup>70</sup> Common Military List of the European Union [2007] OJ L88/58. See also Recital 10 ICT.

<sup>71</sup> The CML is updated by the Council annually usually as a consequence of an amendment to the ‘Munitions List’ adopted in the framework of the Wassenaar Arrangement. The latest version is the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, List of Dual-Use Goods and Technologies and Munitions List, WA-LIST (14) 2\* 25 March 2015.

<sup>72</sup> Recitals 37 and 45 and Article 13(1) ICT. See Commission Directive 2010/80/EU [2010] OJ L308/11; Directive 2012/10/EU [2012] OJ L85/3; Directive 2014/108/EU [2014] OJ L359/117.

<sup>73</sup> *Transposition Report*, *supra* note 7, at 13.

<sup>74</sup> *Ibid.* See also 2016 *Evaluation Report*, *supra* note 5, at 9; *GRIP*, *supra* note 7, at 64 and *Technopolis*, *supra* note 4 at Appendix G, at 107.

<sup>75</sup> COM(2016) 760 final, at 12.

<sup>76</sup> COM(2016) 760 final, at 12.

<sup>77</sup> COM(2016) 760 final, at 12 on revision in the “longer run” regarding exemptions, for example.

<sup>78</sup> No further detail is provided by SWD(2016) 398 final/2, at 38-40.

covered by general transfer licences<sup>79</sup> issued for certified recipients<sup>80</sup> (see Sections 4.3.1. and 6. below) and for armed forces and certain contracting authorities<sup>81</sup> (see Section 4.3.1 below). This “minimum set” is a “subset” of the list of products laid down in the ICT’s Annex. The Recommendations also exclude certain Military List (ML) categories completely from falling within the minimum set,<sup>82</sup> include others for most goods but with exceptions, or only include a few goods of some other ML categories. Therefore, Member States and the Commission have carefully decided, item-by-item on the CML, if the item can be included in the subset.<sup>83</sup>

However, it is doubtful whether this reduces the coverage problems outlined above. This is because the “subset” of defence goods, while comprising more than half of the list in the Annex, is not necessarily immune from the problems regarding updating and aligning the Annex and CML outlined above. At best, the Recommendations partly address the issue of which types of product should typically be subject to a general transfer licence for the armed forces and certified recipient categories, as a minimum (see below Section 4.3.2). The categories within the sub-set would still have to be updated, presumably by the proposed Commission Decisions. Thus, the Commission assumes that by identifying a subset of defence goods for general licences in just two select circumstances, this soft-law approach will expedite the uptake and use of general licences and remove barriers to trade more quickly than ‘hard law’ harmonisation. The latter would involve an amendment to the ICT, which is considered but not (yet) proposed in the 2016 *Evaluation Report*.

It is argued that the Commission’s approach is highly problematic. Fundamentally, it raises underlying constitutional questions about the propriety of using CFSP-like mechanisms in the context of internal transfers, empowering Member States but excluding the European Parliament<sup>84</sup> and ultimately the CJEU<sup>85</sup> in an area with Internal Market competence (see Section 2.2 above). Further, it relies on the good faith of Member States or peer pressure to adhere to the Recommendation. The crucial issues of coverage by reference to the Annex and CML should be addressed in a clear and certain manner, principally through a ‘hard law’ amendment of the ICT itself and not exclusively through confusing ‘soft-law’ Recommendations. As will be argued in Section 4.3.1. below, a ‘hard law’ amendment should similarly clarify the circumstances in which general licences must be used, according to which minimum prescribed categories of product.

#### 4. Transfers and licences

The fundamental innovation intended by the ICT is to qualitatively differentiate transfers from exports. Article 3(2) defines a ‘transfer’ as “any transmission or movement of a defence-related product from a supplier to a recipient in another Member State”.<sup>86</sup> The transfer of defence products from one Member State to another must be subject to prior authorisation in the form of a licence. However, a further licence cannot be imposed for mere passage<sup>87</sup> of those products through one or more other Member States or for entrance onto Member State territory, unless justified on public security or public policy grounds.<sup>88</sup> Further

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<sup>79</sup> COM(2016) 760 final, at 11.

<sup>80</sup> C(2016) 7728 final, at 3.

<sup>81</sup> C(2016) 7711 final, at 3.

<sup>82</sup> For example, ML2 large smooth-bore weapons, ML3 ammunition, or ML8 energetic material.

<sup>83</sup> See Recitals 5 of both Commission Recommendations C(2016) 7728 final and C(2016) 7711 final.

<sup>84</sup> An amendment of the ICT would involve the European Parliament through the ordinary legislative procedure.

<sup>85</sup> A Recommendation is not legally binding and can therefore not be challenged in an action for annulment.

<sup>86</sup> Article 3(3) and 3(4) ICT which define ‘supplier’ and ‘recipient’, respectively.

<sup>87</sup> Recitals 9, 17 and Article 4(1) ICT. Article 3(7) ICT defines ‘passage through’ as “the transport of defence-related products through one or more Member States other than the originating and receiving Member States.”

<sup>88</sup> Recital 14 ICT identifies the safety of storage, risk of diversion and prevention of crime as legitimate reasons. Germany, Hungary and the Netherlands have made use of these exceptions to maintain entrance and passage

to this aim, the ICT seeks to facilitate the progressive replacement of individual *ex-ante* control, exercised through narrowly defined licences, with more broadly defined licences compensated by *ex-post* controls, including conditions on export after licenced transfers.<sup>89</sup> It is therefore important to acknowledge that the ICT does not create a European “licence-free zone” of free movement comparable to most other goods. A transfer licence is still a form of prior-authorisation but one which is to be distinguished from an export licence.<sup>90</sup> Two principal reasons have been identified for retaining a licencing regime. The first concerns the relative infancy of a common foreign policy and “uneven levels of trust” about the extent to which certain external borders maintain sufficient control.<sup>91</sup> The second is that the removal of licencing altogether would complicate enforcement of export controls that are otherwise required by existing international export control regimes.<sup>92</sup> Ultimately, licencing was still considered necessary as a “vehicle” to carry possible re-export limitations.<sup>93</sup>

#### 4.1. *Types of transfer licence*

Prior to the ICT, individual, general, and global licences were available. All three have been retained under the ICT and transposed into national laws.<sup>94</sup> Member States remain free to determine the appropriate choice of licence and the types of products covered by it.<sup>95</sup> An individual transfer licence must be specifically requested by a supplier. It grants one specific authorisation for a single transfer of a specified quantity of specified products to be transmitted in one or several shipments to only one recipient (Article 7 ICT). A general transfer licence is an authorisation granted to suppliers established in one Member State to perform transfers of specified defence-related products to categories of recipients located in another Member State. The main distinguishing feature is that a Member State must publish a general licence in order that a supplier meeting its terms and conditions is directly authorised to transfer without having to specifically request to do so in each case (Article 5 (1) and Recital 21 ICT). Removal of such requests enables a freer movement of specified goods and increased security of supply. Between the extremes of an individual and general licence is the global transfer licence. A global licence must be specifically requested by a supplier. It grants a specific authorisation to transfer products to authorised recipients in one or more other Member States (Article 6(1) ICT). The significant point of departure for the ICT is an attempt to change the type of licence predominantly used in practice, away from restrictive individual licences towards broader general licences and to exempt certain transfers from licencing altogether.

#### 4.2. *Individual transfer licences*

Formerly, individual transfer licences were the most common licence, contributing significantly to the costs and barriers to trade discussed in Section 2.1.<sup>96</sup> Notwithstanding

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licences or prior notification systems for certain product categories. See *Transposition Report*, *supra* note 7, at 18. According to *The impact of the ‘defence package’ Directives on European Defence*, *supra* note 7, at 43 fn72, this is a limitation to the ICT’s application; in practice, companies will have to inquire as to the existence of such measures. *Technopolis*, *supra* note 4, Appendix K, at 171 states that such measures are permissible on public security or transport safety grounds but acknowledges that their compatibility with EU law has not been comprehensively tested and even considers a potential need for legislation to address transit licences.

<sup>89</sup> Recital 29 ICT.

<sup>90</sup> Article 3(5) ICT which defines a ‘transfer licence’. See also Recital 16 ICT. Article 3(6) ICT defines an ‘export licence’.

<sup>91</sup> *Impact Assessment*, *supra* note 6, at 24.

<sup>92</sup> *Ibid.* identifying Wassenaar and the Missile Technology Control Regime. See also Recitals 7 and 28 ICT.

<sup>93</sup> *Impact Assessment*, *supra* note 6, at 24-25.

<sup>94</sup> *Ibid.*, at 4. See also Article 4(4) ICT and *Transposition Report*, *supra* note 7, at 8.

<sup>95</sup> Article 4(5) and Recital 18 ICT.

<sup>96</sup> *Impact Assessment*, *supra* note 6, at 36.

their continued availability, the ICT intends to reduce recourse to individual licences to four exhaustively defined circumstances discussed below. However, beyond prescribing these circumstances, the ICT contains no further provisions regarding the permitted terms and conditions and period of validity.<sup>97</sup>

The first circumstance in which individual licences may continue to be used is where the request is limited to one transfer. This is unlikely to be particularly problematic given that the licence is not imposed by the licencing authority in order to limit the user's ability to transfer but rather a single transfer is expressly requested by the user. The second is where an individual licence is necessary for compliance with international obligations and commitments. This reflects the ICT's general approach to ensuring compliance with other international obligations and commitments.<sup>98</sup> Reliance on this circumstance is nevertheless likely to be subject to implied limitations to ensure that those international agreements or arrangements genuinely require an individual licence and are not used to circumvent the Directive. The third is where an individual licence is necessary for the protection of essential security interests or on grounds of public policy.<sup>99</sup> As indicated in Section 2.2.1, this may be an attempt to accommodate such interests inside the regime rather than through a TFEU exception or derogation. However, to avoid this circumstance developing into a loophole, in line with the jurisprudence on these TFEU derogations outlined in Section 2.2.1 above, the use of an individual licence should be subject to proportionality requirements and judicial review. There is a danger that, when challenged, Member States could retrospectively justify an individual licence under this circumstance. Therefore, there is a clear need for the reasons to grant an individual licence to be documented and reviewed by a senior licencing officer. The ICT should be amended to include such a requirement.

The final circumstance is where a Member State has "serious reason" to believe that the supplier will not be able to comply with all the terms and conditions necessary to grant it a global transfer licence (see Section 4.4 below). Whilst this reinforces the ICT's attempt to institute a hierarchy or preference of licences (i.e. general or global in preference to individual), Member States exercise discretion to determine the terms and conditions (and products) for each type of licence. It is therefore difficult to know which terms and conditions are more or less susceptible to non-compliance such as to legitimate use of an individual licence. This is symptomatic more generally of the fact that the ICT does not provide clear guidance to Member States in differentiating when a particular type of licence should be used as well as the terms and conditions applicable to each type. Secondly, it is not clear what will constitute a "serious reason". It is argued that a revised ICT should retain a circumstance in which an authority grants an individual licence on its own initiative (as opposed to at the supplier's request) and for reasons other than to protect essential security, as some default authorisation is necessary e.g. if it is not possible to comply with an alternative licence and for truly sensitive products.<sup>100</sup> However, clarity is required as to the reasons that might justify an individual licence as well as the burden of proof. This is necessary to safeguard against the risk of abuse which could prejudice a successful transition to general licences as the norm.

Ultimately, there are few indications that recourse to individual licences is decreasing. According to the 2016 *Evaluation Report* individual licences continue to be used for 80-90

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<sup>97</sup> According to *UNISYS*, supra note 6, at 14, prior to the ICT, individual licences typically expired after 12 months or on fulfilment of a specified quantity. In the UK, individual licences under the ICT are considered equivalent to Standard Individual Export Licence (SIELs) and are valid for two years. See the Department for Business Innovation & Skills, Notice to Exporters 2012/37 Implementation of the European Union Directive 2009/43/EC (Intra-Community Transfer of Defence Goods or 'ICT Directive'), at 3.

<sup>98</sup> Recital 7 ICT.

<sup>99</sup> See also Recital 14 ICT.

<sup>100</sup> The authors are grateful to Baudouin Heuninckx for discussions on this issue.

per cent of transfers.<sup>101</sup> Starkly, the *Report* contains scarce reference to individual licences. Unlike the Recommendations and proposals for soft-law guidance regarding general licences, the *Evaluation Report* simply states that competent authorities should “encourage operators to use [general licences] instead of [individual licences] where circumstances allow.”<sup>102</sup>

#### 4.3. General transfer licences

As indicated, Member States are free to determine the appropriate licence: Article 4(5) ICT. However, the ICT signals a clear emphasis on general transfer licences as the least restrictive form.<sup>103</sup> Prior to the ICT, Member States, with the exception of the UK, did not provide for extensive use of general licences.<sup>104</sup> The Commission had even considered a regime exclusively comprising general licences. Whilst this could have minimised bureaucracy and significantly improved security of supply, the Commission considered it to be unacceptable not least because the general licence is not suitable for the most sensitive equipment.<sup>105</sup>

##### 4.3.1. Circumstances requiring general licences

The ICT provides a list of “at least” four circumstances in which publication of a general licence is mandatory: Article 5(2)(a)-(d) ICT. Therefore, Member States may exceed the minimum by requiring general licences in additional circumstances not listed.<sup>106</sup>

Perhaps the most significant circumstance requiring a general licence is where the recipient is certified in accordance with the ICT’s certification provisions. The combined ability of a supplier to rely on a general licence compensated by certification of the recipient is a key component of the ICT, which is reserved for discussion in Section 6 below.<sup>107</sup> As outlined in Section 3, above, one of the two November 2016 Commission Recommendations provides that Member States will issue general licences for certified recipients covering, “as a minimum”, the sub-set of products listed in the ICT Annex.<sup>108</sup> This is intended to result in quicker issuance of general licences with regard to those products. Additionally, the Recommendation provides for a non-exhaustive list of conditions to be incorporated into the general licence for certified recipients, concerning geographic validity, re-transfers within the EEA, subsequent sales not known at the time of transfer, and ex-post verification.<sup>109</sup>

A second circumstance is where the recipient is part of a Member State’s armed forces or a defence contracting authority, purchasing for the exclusive use by that Member State’s armed forces. This circumstance is intended to have a specific impact on defence procurement. For instance, Article 23(a) Defence and Security Procurement Directive 2009/81/EC provides that, in order to ensure security of supply, a contracting authority can require a tenderer to demonstrate that it will be able to honour its obligations regarding the export, transfer and transit of goods associated with the contract. It is usually the case that at the time of tender preparation, the authorisation to transfer equipment will not yet have been

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<sup>101</sup> *Supra* note 5, at 5. See also *Technopolis*, *supra* note 4, at 2. This constitutes approximately 20,000-25,000 per year, see Appendix G, 112-113, Table 48.

<sup>102</sup> COM(2016) 760 final, at 12. SWD(2016) 398 final/2 does not address individual licences.

<sup>103</sup> *GRIP*, *supra* note 7, at 42: “the licence of reference.”

<sup>104</sup> *Impact Assessment*, *supra* note 6, at 15, 34. The UK has widely implemented a general licence for military goods under Open General Export Licences (OGELs). See Masson et al., *The “Transfer Directive”*, *supra* note 3, at 15-19. This has enabled an effective transposition of the ICT in the UK with relatively few adjustments. See also Notice to Exporters 2012/37 *supra* note 97 referring at 2 to the ICT model being “UK inspired”.

<sup>105</sup> *Impact Assessment*, *ibid.*, at 34-35.

<sup>106</sup> On minimum harmonisation: Weatherill, “Beyond preemption? Shared competence and constitutional change in the European Community” in O’Keefe and Twomey (eds) *Legal Issues of the Maastricht Treaty* (Chancery Law Publishing, 1994); Dougan, ‘Minimum Harmonization and the Internal Market’ (2000) 37 CML Rev 853.

<sup>107</sup> Article 9 ICT concerns the certification of recipients of defence related products. See also Recital 23 ICT.

<sup>108</sup> C(2016) 7728 final, at 3 with the sub-set list at 3-4.

<sup>109</sup> C(2016) 7728 final, at 5-6.

granted. Therefore, in some cases, contracting authorities may consider that a foreign supplier poses a greater risk with regard to guaranteeing securing supply than a domestic supplier given the difficulty of having to obtain a licence. The Commission's Guidance Note on Security of Supply, published to assist transposition of Directive 2009/81/EC, suggests that this uncertainty is now removed given that a general licence will have already been published with the necessary authorisation.<sup>110</sup> Recital 22 ICT also indicates that this will "greatly increase" security of supply to armed forces.

However, as will be discussed in Section 5 below, general licences can still be withdrawn or granted with end-use restrictions and much still depends on the type of products covered, all of which may continue to hinder security of supply.<sup>111</sup> More fundamentally, it may be questioned to what extent security of supply can be guaranteed whatever licence is used not least because such guarantees only represent the tenderer's position at the time of tender.<sup>112</sup> Rather, the best assurance of optimal security of supply is to eliminate any licencing requirement altogether. This is currently only possible if a Member State decides to exempt armed forces transfers from prior authorisation. As will be indicated in Section 4.3.3 below, there is an argument for presumptively exempting armed forces transfers from prior authorisation. According to the latest report, the armed forces circumstance currently represents 21 per cent of applications for registration to use an ICT general licence.<sup>113</sup>

Similar to the 2016 Commission Recommendation concerning general licences for certified recipients, another Recommendation provides that Member States will issue general licences for armed forces and relevant contracting authorities covering, "as a minimum", the sub-set of products listed in the ICT Annex as well as a non-exhaustive list of conditions to be incorporated concerning geographic validity, re-transfers within the EEA, subsequent sales not known at the time of transfer, and ex-post verification.<sup>114</sup> The approach in the Recommendation must be contrasted with the fact that, as discussed in Section 4.3.3. below, the ICT also currently provides that Member States may actually exempt transfers from all licence requirements where the recipient is part of the armed forces. It is clear that these options suggest that transfers under this constellation present lesser security risks in general. This combination of coverage and optional exemption raises questions as to whether transfers for armed forces should be subject to licencing at all. Ultimately, both the fact that only a few Member States have provided for full exemption and the Commission's Recommendation suggest a continued desire to have a general licence for armed forces albeit with a commitment to greater convergence in products covered and the possibility of exemption from licencing. However, it is argued that the Recommendation is insufficient to achieve minimum harmonisation for armed forces transfers. As indicated, the possibility of exemption already signals that this field is more a candidate for total liberalisation than optional harmonisation through a Recommendation. Therefore, if general licences do remain strictly necessary for such transfers, at the very least, the ICT should be revised to make it a legal requirement that general licences for armed forces transfers must be subject to minimum prescribed product categories covered, prescribed categories excluded and minimum conditions. Indeed, the 2016 *Evaluation Report* itself considers the "possibility of

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<sup>110</sup> DG Internal Market and Services, Guidance Note, *Security of Supply*, at 10. There is no comparable Guidance Note for the implementation of the ICT although the issuance of such guidance is rare.

<sup>111</sup> This view has also been expressed by the UK in its guidance published to assist interpretation of the UK Regulations implementing Directive 2009/81/EC. See The Defence and Security Public Contract Regulations 2011, Chapter 12 – Security of Supply, at 7, para. 38.

<sup>112</sup> Heuninckx, 'Trick or Treat?' *supra* note 2, at 24.

<sup>113</sup> *Technopolis*, *supra* note 4, Appendix G, at 114. See also: SWD(2016) 398 final/2, at 18.

<sup>114</sup> C(2016) 7711, at 5-6.

converting the [Recommendations] on [general transfer licences] into binding provisions.<sup>115</sup> Whilst the Commission's tentative approach is understandable given the continuing diversity of Member State practices post-ICT, it is difficult to see how a non-legally binding Recommendation will significantly improve compliance. It also seems impractical for the Commission to issue non-legally binding Recommendations every time it wishes to test whether or not an area could be amenable to further harmonisation through legal reform at some indeterminate point in the future. It is also not conducive to legal certainty.

The third and fourth circumstances are where the transfer is made for the purposes of demonstration, evaluation or exhibition or for the purposes of maintenance and repair.<sup>116</sup> The latest report indicates that these represent 71 per cent of applications to use general licences and are therefore the most common.<sup>117</sup> Again, as will be indicated in Section 4.3.3, it is arguable that such transfers could be presumptively exempted from licencing altogether. However, the high uptake of general licences for this circumstance suggest that retention of a general licence is the preferred approach. It might also explain why no Commission Recommendation was issued for this circumstance. However, the 2016 *Evaluation Report* suggests that a further Recommendation for this circumstance is considered.<sup>118</sup>

In addition, Member States participating in an intergovernmental cooperation programme may publish a general licence for transfers necessary for the programme's execution.<sup>119</sup> Few large armaments producing Member States have transposed this option.<sup>120</sup> As explained in Section 4.3.3 below, it is arguable that such transfers could be the subject of presumptive exemption from licencing altogether, although this matter is complicated by general uncertainty about the extent to which the ICT should include or exclude intergovernmental cooperation within its coverage as discussed in Section 2.2.2. above.

Overall, the potential variability of national transposition resulting from minimum harmonisation is already apparent. According to the latest report, at least three Member States do not offer any general licences, four do not offer all four mandatory licences whilst at least ten others go beyond the mandatory circumstances e.g. by providing for the optional cooperative armament programme general licences or for transfers to the police, customs and border and coast guards.<sup>121</sup> The ICT also seems to suggest that further general licences could be published where the risks to security are low in view of the nature of the product and recipients.<sup>122</sup> The 2016 *Evaluation Report* considers creating new circumstances, "e.g. for product return after exhibition or repair, for cross-border cooperation in research, [or] for all purpose transfers (e.g. covering purchase, maintenance, supply of spare parts)."<sup>123</sup> However,

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<sup>115</sup> COM(2016) 760 final, at 13.

<sup>116</sup> In the case of maintenance and repair, the recipient must be the originating supplier of the defence-related products: Article 5(2)(d) ICT.

<sup>117</sup> *Technopolis*, *supra* note 4, Appendix G, 114: 'demonstration, evaluation or exhibition (41%) and 'repair or maintenance' (31%). See also: SWD(2016) 398 final/2, at 18.

<sup>118</sup> COM(2016) 760 final, at 11 (bullet point 3).

<sup>119</sup> Recital 24 and Article 5(3) ICT. An example might include the *Eurofighter/Typhoon* fighter. See generally: Heuninckx, *The Law of Collaborative Defence Procurement in the European Union* (CUP, 2016), Chapter 8.

<sup>120</sup> Article 5(3) ICT. According to the *Transposition Report*, *supra* note 7, at 9, Spain envisages general licences for transfers related to operations of NATO and NAMS; Bulgaria, Greece, Cyprus, and Malta envisage general licences for cooperation programmes. See also *The impact of the 'defence package' Directives on European Defence*, *supra* note 7, at 46, fn 82. This means that large armaments-producing Member States have not transposed this option. The authors are grateful to Baudouin Heuninckx for this observation.

<sup>121</sup> *Technopolis*, *supra* note 4, at 33, Table 14. Bulgaria, Iceland and Ireland do not currently offer any general licences; France, Italy, Romania and Slovenia do not provide all of the mandatory licences. See also Appendix G, 111. See also: SWD(2016) 398 final/2, at 16-17.

<sup>122</sup> Recital 25 ICT.

<sup>123</sup> COM(2016) 760 final, at 12-13.

this is not a proposed amendment and only considered “in the long run”.<sup>124</sup> Conversely, as will be suggested in Section 4.3.3 below, the ICT’s primary focus should be on subjecting the highest risk transfers to licencing whilst exempting low risk transfers from licencing altogether, rather than establishing minimum licencing requirements whatever the risk.

#### 4.3.2. Coverage of general licences

It is recalled from Section 3 above that Member States determine not only the choice of licence but also the types of products listed in the Annex corresponding to the CML covered by the licence.<sup>125</sup> Several issues have arisen in this regard. Firstly, practice already indicates that, whilst all Member States refer to the CML, there is continuing use of national and international lists when determining the coverage of licences.<sup>126</sup> This variability is exacerbated by the fact that the Annex does not always correspond to the CML.<sup>127</sup>

Secondly, it is questionable whether the ICT provides an effective balance between Member States’ freedom to limit the types of products that can be subject to a general licence and ensuring that general licences can be used for as broad a range of products as possible. On the one hand, Member States appear to define the scope of their general licences case-by-case based on factors such as the recipient in question, the sensitivity of the product, risk assessment and diversion risk on export.<sup>128</sup> This is a perfectly legitimate exercise, allowing authorities to tailor a licence to a particular security scenario.<sup>129</sup> On the other hand, post-transposition practice suggests that there is a lack of consensus as to how to define or classify “sensitive”<sup>130</sup> products that should be excluded from the scope of a general licence.<sup>131</sup> Given the need to encourage the uptake of general licences, it is understandable that the ICT provides maximum flexibility to select from the full range of listed products. Further, it is preferable for authorities to assess the sensitivity of products to be covered by a general licence as opposed to using the sensitivity of products as a basis to simply legitimate recourse to individual licences as has previously been the case. However, as discussed in Section 3, the 2016 Recommendations clearly indicate the possibility to distinguish less sensitive products that should typically be subject to general licences from those which should or may not.<sup>132</sup> It was argued that an amendment to the ICT should formalise mandatory product categories typically covered by general licences and those *prima facie* excluded.<sup>133</sup> The ICT should also include an amendment that requires that any licence conditions must reflect a genuine and proportionate control need to avoid possible attempts to circumvent the ICT. Whilst Member States might argue that this impinges on the exercise of their transfer policies, it has been observed that national practice at present “varies greatly [...] and patterns are difficult to establish”.<sup>134</sup> Lack of “visibility and clarity” of different national lists<sup>135</sup> and conditions has ultimately made general licences less attractive for companies.<sup>136</sup>

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<sup>124</sup> COM(2016) 760 final, at 12.

<sup>125</sup> Recital 18 and Article 4(5) ICT. Concerning general licences specifically, see Article 5(1) ICT.

<sup>126</sup> GRIP *supra* note 7, at 23-27, 28-9, and 38-9.

<sup>127</sup> Ibid., at 25, Luxembourg appears to be the only country referring to the most recent version of the ICT Annex in the definition of defence goods covered by its general transfer licences.

<sup>128</sup> GRIP, *supra* note 7, at 23.

<sup>129</sup> The authors are grateful to Baudouin Heuninckx for this observation.

<sup>130</sup> This must be contrasted with Article 4(8) ICT which indicates that the sensitivity of a transfer of components is relevant to determining the application of any export limitations for components. See Article 4(8) ICT.

<sup>131</sup> GRIP, *supra* note 7, at 38.

<sup>132</sup> Article 4(7) ICT already requires Member States to assess the sensitivity of the transfer when determining the terms and conditions of licences for components, taking into account their nature and significance.

<sup>133</sup> An obvious example might be category ML17g nuclear power generating equipment. The authors are grateful to Baudouin Heuninckx for his observations.

<sup>134</sup> GRIP, *supra* note 7, at 27.



It has been suggested that the ICT should ideally include a harmonised list of covered products using the CML as an already widely used reference point with clearer correspondence to international control lists.<sup>137</sup> A harmonised list would be comprehensive based on a common understanding of “sensitive products” to be definitively included or excluded from the list. However, it appears impossible at this stage to recommend a detailed list of sensitive products to be excluded that would be accepted by all Member States.<sup>138</sup> It has therefore been recommended that a positive or minimum list should be adopted.<sup>139</sup> Determining “sensitivity” of products based on product coverage rather than Member State discretion may reduce subjectivity. Several Member States and companies have called for such a list “while taking into account national limitations” which would presumably need to be clearly defined.<sup>140</sup> However, some flexibility needs to be retained to encourage the use of general licences. The 2016 Commission Recommendations on general licences for armed forces and certified companies,<sup>141</sup> discussed in Sections 4.3.1 above and 6. below, address these issues to some extent, but only in relation to the subset of defence goods they contain.

#### 4.3.3. Exemptions

It is recalled from Section 4.3.1 above that the ICT identifies four circumstances in which general licences are required. However, the ICT also identifies five circumstances in which Member States may optionally exempt transfers from prior authorisation altogether.<sup>142</sup> As will be discussed, it is suggested that the similarity between certain circumstances requiring or permitting general licences and certain circumstances permitting exemption from licencing altogether, indicate uncertainty as to the level at which to set the floor of harmonisation. On the one hand, it could be argued that the exemptions merely offer Member States the option of going beyond harmonisation to achieve total licence-free liberalisation. On the other hand, it also raises legitimate questions as to whether certain circumstances requiring or permitting the use of general licences should be subject to prior authorisation through a licence at all.

Two of the circumstances allowing optional exemption from prior authorisation appear to be the least controversial in achieving total liberalisation. These are, first, where the EU, NATO, the International Atomic Energy Agency or other intergovernmental organisations send supplies in the performance of their tasks (Article 4(2)(b) ICT) and, second, “the transfer is linked to humanitarian aid in the case of disaster or as a donation in an emergency” (Article 4(2)(d) ICT). As indicated in Section 4.3.1 above, there are no similar circumstances otherwise requiring mandatory use of a general licence. Concerning the first circumstance, whilst supplier or recipient status as an international body does not automatically eliminate security and export diversion risks, such risks are likely to be limited in transfers between allies as opposed to a recipient who is a private economic operator. Yet, according to the latest study, only eight Member States provide full exemption; five provide partial exemption with some countries specifying only a few organisations or NATO only.<sup>143</sup> Concerning the second circumstance, in addition to enabling expeditious transfer, references

<sup>135</sup> GRIP, *ibid.*, at 27. According to the *Transposition Report*, *supra* note 5, at 9 only six Member States had communicated their respective lists to the Commission.

<sup>136</sup> GRIP, *supra* note 7, at 39.

<sup>137</sup> GRIP, *ibid.*, at 63 emphasises the design of the list based specifically on the Wassenaar List.

<sup>138</sup> GRIP, *supra* note 7, at 39.

<sup>139</sup> GRIP, *ibid.*, at 63.

<sup>140</sup> GRIP, *supra* note 7, at 48 and 63.

<sup>141</sup> C(2016) 7711 final; C(2016) 7728 final.

<sup>142</sup> Article 4(3) ICT further provides for the Commission on its own initiative or at a Member State’s request to amend the ICT to exempt three additional circumstances from prior authorisation.

<sup>143</sup> *Technopolis*, *supra* note 4, at 31-32, Table 13. Eleven countries provided no exemption. For a breakdown of exemptions applied in national legislation, see Appendix H and SWD(2016) 398 final/2, at 15-16.

to disasters and donations suggest that the material in question will not raise major security concerns. This exemption is also consistent with the EU's humanitarian obligations.<sup>144</sup> However, again, only ten Member States provide full exemption; two provide partial exemption with one country only exempting government donations and the other limiting equipment to rescue equipment.<sup>145</sup>

More problematic are two circumstances permitting optional exemption from prior authorisation which, broadly construed, cover the same circumstances which Member States must otherwise subject to mandatory general licencing. The first is where the supplier or recipient is a governmental body or part of the armed forces (Article 4(2)(a) ICT). This is similar to the mandatory ground for use of a general licence discussed in Section 4.3.1 above.<sup>146</sup> The second is where the transfer is necessary for or after repair, maintenance, exhibition or demonstration (Article 4(2)(e) ICT). Again, this is similar to the mandatory ground for use of a general licence discussed in Section 4.3.1.<sup>147</sup> Concerning the government body and armed forces exemption, a similar rationale applies to that of exemption of transfers by international organisations. It is reported that only eight Member States provide full exemption; nine provide partial exemption with many countries limiting its scope to cover use by that other Member State when its forces are being deployed abroad.<sup>148</sup> Concerning the demonstration to repair exemption, this reflects the general reality that products at the pre/post-production stage carry a lower risk. It is reported that only five Member States provide full exemption and only five provide partial exemption, covering movement in only one direction or certain activities.<sup>149</sup>

It is also recalled from Section 2.2.2 above, that Member States may exempt from licencing transfers necessary for the implementation of a "cooperative armament programme between Member States" (Article 4(2)(c) ICT). It is reported that only seven Member States have provided full exemption.<sup>150</sup> This "half-way" position between exemption and permitted use of general licencing for defence cooperation reflects both the importance and flexibility attributed to cooperative programmes under the Defence Package as a whole. Directive 2009/81/EC similarly provides for exclusion of cooperative programmes from its award procedures.<sup>151</sup> A transfer licence exemption is broadly consistent with such objectives, although, as indicated in Sections 2.2.2 and 4.3.1 above, the extent to which intergovernmental cooperation should be subject to, or excluded from, the ICT requires clarification.

The correspondence between certain circumstances permitting optional exemption and those requiring mandatory or permitted general licencing begs the question as to whether a revised ICT could be recalibrated. Firstly, the two circumstances providing optional exemption from prior authorisation which are not also covered by general licences i.e. international organisation and humanitarian transfers could be categorically excluded.<sup>152</sup>

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<sup>144</sup> Articles 208-211 TFEU.

<sup>145</sup> *Technopolis*, *supra* note 4, at 31-32, Table 13. 12 countries provided no exemption. For a breakdown of exemptions applied in national legislation, see Appendix H and SWD(2016) 398 final/2, at 15-16.

<sup>146</sup> Article 5(2)(a) ICT.

<sup>147</sup> Article 5(2)(c) and (d) ICT.

<sup>148</sup> *Technopolis*, *supra* note 4, at 31-32, Table 13. Seven countries have no exemption. See breakdown of exemptions applied in national legislation, Appendix H. See also: SWD(2016) 398 final/2, at 15-16.

<sup>149</sup> *Technopolis*, *ibid.*, at 31-32, Table 13 and 33. Fourteen countries provided no exemption. For a breakdown of the exemptions as applied in national legislation, see Appendix H.

<sup>150</sup> *Technopolis*, *supra* note 4, at 32-32, Table 13. There are no partial exemptions. For a breakdown of exemptions applied in national legislation, see Appendix H and SWD(2016) 398 final/2, at 15-16.

<sup>151</sup> See Article 13(c) Directive 2009/81/EC. For a discussion of this provision, see Trybus, *Buying Defence and Security in Europe*, *supra* note 2, at 283-288.

<sup>152</sup> This would not necessarily preclude the possibility for Member States to justify a licencing requirement based on Article 36 or 346 TFEU.

Secondly, the armed forces and demonstration to repair circumstances which are subject to general licences but which also correspond to circumstances permitting optional exemption could be presumptively excluded from prior authorisation altogether. This would possibly mean total licence free liberalisation perhaps subject only to possible prior authorisation if a public policy or public security reason can be established.<sup>153</sup> This would send a clearer signal that such “low-risk” transfers should operate in a uniform licence free zone unless it can be established that prior authorisation is necessary in exceptional cases. As indicated in Section 2.2 above, given that any form of licencing requirement is generally considered to be a restriction on the Internal Market, the fewer circumstances subject to licencing the better.<sup>154</sup> At present, the current portfolio of optional exemptions indicates flexibility but also a certain ambivalence as to the baseline at which to set harmonisation.<sup>155</sup> This has caused further uncertainty in implementation by Member States. According to the latest study, there was “widespread confusion” among competent authorities in differentiating the circumstances permitting exemptions and the mandatory grounds for general licences.<sup>156</sup>

The 2016 *Evaluation Report* considers a possible revision of the ICT with regards to the exemptions, “such as: making exemptions binding on Member States and enlarging the scope of exemptions”.<sup>157</sup> However, this is only considered in the “long run”, not proposed in the *Report* itself, and no details are given concerning which exemptions could be revised.

#### 4.4. *Global transfer licences*

As indicated in Section 4.1 above, the global licence is situated between the extremes of a general licence and individual licence. Its main simplification potential is that it is not specific to a precise shipment and, thus, can be used several times to cover similar transfers and global transfer licences are typically not subject to quantitative limits and are valid over a long period.<sup>158</sup> Historically, global licences have been considered useful for routine shipments to habitual customers or for SMEs with limited catalogues.<sup>159</sup> Their potential had already been realised in certain Member States before the ICT.<sup>160</sup>

However, it is observed that the intended effect of global licences is uncertain and difficult to discern in light of no or limited information having been communicated regarding their implementation and application under the ICT.<sup>161</sup> Firstly, the underlying rationale for global licences is now unclear. The Commission opted against a ‘global licences only’ approach because a combination of general and global licences would enable general licences for routine non-sensitive transfers while also accommodating the necessary flexibility for

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<sup>153</sup> Concerning cooperative programmes, there may be a case for the use of a licence if the programme concerns sensitive research and development (R&D).

<sup>154</sup> Perhaps even more radically, it may be questioned whether it would be possible to introduce requirements short of licencing to ensure that such transfers are subject to at least some form of monitoring provided such monitoring does not, itself, infringe EU law.

<sup>155</sup> Article 5(2) ICT enumerating the circumstances requiring mandatory general licences simply indicates that it is “without prejudice to Article 4(2)” enumerating the list of optional exemptions from prior authorisation.

<sup>156</sup> *Technopolis*, *supra* note 4, at Appendix G, at 108 stating that this was “presumably not helped by the similar categories given for each in the Directive”.

<sup>157</sup> COM(2016) 760 final, at 12.

<sup>158</sup> *Impact Assessment*, *supra* note 6, at 35 and 36.

<sup>159</sup> *Impact Assessment*, *ibid.*, at 35. See also *GRIP*, *supra* note 7, at 39.

<sup>160</sup> *GRIP*, *ibid.* In 2002, France introduced global licences based on a catalogue of participating companies, specifically targeting SMEs. See *Impact Assessment*, *supra* note 6, at 36. The first 35 licences replaced 1,250 individual licences, a reduction in administrative bureaucracy by a ratio of 36. Similarly, during the ICT's preparatory phase, Romania indicated that it had replaced 700 individual licences with 7 global licences: *ibid.*

<sup>161</sup> *Transposition Report* *supra* note 7, at 10. In the UK, these are the equivalent of Open Individual Export Licence (OIELs). See generally, See Notice to Exporters 2012/37 *supra* note 97, at 3.

more sensitive transfers through global licences.<sup>162</sup> Therefore, whilst global licences were formerly used to cover routine shipments of less sensitive products in great quantity over a long period, it now appears that global licences should be used to cover less routine shipments of more sensitive products over a maximum period of three years.<sup>163</sup> Secondly, in contrast to general and individual licences, the ICT does not prescribe circumstances for use of global licences.<sup>164</sup> Thirdly, Member States must determine the products or categories of products covered and the authorised recipients, again, indicating considerable discretion in the use of such licences (Article 6(2) ICT). It is argued that this does not make the global licence the intended “default” type of licence under the ICT. It is suggested that if this had been the EU legislator’s intention, more detailed provision on global licences would have been included. The inclusion of global licences may reflect the view that they are intended merely as a transitional measure until general licences are fully operational.<sup>165</sup>

The Commission had acknowledged a small risk that Member States may define global licences in such restrictive terms as to be equivalent to individual licences, but states that there is little reason to fear such abuses as a Member State would compromise the competitive position of its industries.<sup>166</sup> However, this does presuppose that competition rather than national security or some other motive will be the primary determinant when making licencing decisions. Nevertheless, global licences could be relied on, in particular, by small businesses used to such licences in order to avoid the perceived administrative and resource burdens of the certification regime under general licences discussed in Section 6 below.<sup>167</sup> The latest report indicates that between 2012-2014, there has been a slight increase in the use of global licences,<sup>168</sup> but the 2016 *Evaluation Report* suggests that global licences constitute less than 5 per cent of transfers.<sup>169</sup>

If global licences are transitional, it is suggested that the ICT should provide an illustrative list of circumstances in which a global licence must or can be used. This is necessary to clarify the role of global licences as an alternative to general and individual licences. Either way, the current provisions on global licences look somewhat brief and basic when compared to the more detailed general and individual licencing provisions.

#### 4.5. *The details: licence form, registration, terms, conditions and supplier information*

The ICT neither prescribes any particular documentary form for general licences nor their publication in specific locations. According to recent reports on implementation of the ICT, general licences are often difficult to access, available in different documentary formats varying in length, published in languages other than English, and not generally available through national websites.<sup>170</sup> Public visibility is integral to the ICT’s credibility among its users. A revised ICT could introduce further harmonisation to address some of these issues

<sup>162</sup> *Impact Assessment*, *supra* note 6, at 36.

<sup>163</sup> Article 6(2). Admittedly, Article 6(2) ICT provides that this period may be renewed although does not identify a minimum or maximum length of renewal. The UK’s latest guidance suggests that the limitation of global licences to only three years constitutes a “significant difference” to previous UK practice. See Notice to Exporters 2012/37 *supra* note 97, at 3.

<sup>164</sup> Rather, Recital 26 ICT simply states that “[w]here a general transfer licence cannot be published, Member states should, upon request, grant a global transfer licence [...] except in the case set out in this Directive [...]”.

<sup>165</sup> *GRIP*, *supra* note 7, at 39.

<sup>166</sup> *Ibid.*

<sup>167</sup> *The impact of the ‘defence package’ Directives on European Defence*, *supra* note 7, at 49 and fn95.

<sup>168</sup> An increase of approximately 18 per cent. A total of approximately 500-600 global licences have been issued each year during this period. See *Technopolis*, *supra* note 4, Appendix G, at 113-114 and Table 49 for a further breakdown. SWD(2016) 398 final/2, at 19 only mentions “year on year increases”.

<sup>169</sup> COM(2016) 760 final, at 5.

<sup>170</sup> *GRIP*, *supra* note 7, at 19 and 20.

e.g. by specifying a common language and format or template. A more complex issue would be the centralisation of electronic access to general licence information.<sup>171</sup>

Even if suppliers can overcome difficulties experienced regarding documentation, before granting a general licence, a Member State may lay down conditions for registration prior to first use.<sup>172</sup> Therefore, Member States retain considerable discretion to define procedures for registration<sup>173</sup> and de-registration, the latter not mentioned at all in the ICT. Again, a revised ICT could introduce further harmonisation regarding (de)registration requirements in order to ensure greater conformity of national approaches.<sup>174</sup>

In addition, whilst certain terms and conditions may protect legitimate public policy or security concerns, it is recalled from Section 2.1 above, that Member States continue to exercise discretion to determine all terms and conditions (Article 4(6) ICT). Post-transposition practice indicates that Member States continue to rely on a diversity of terms and conditions most, if not all, of which appear to be disproportionate.<sup>175</sup> Therefore, many of the criticisms predating the ICT regime continue to dominate under the current regime. This is a highly sensitive issue which Member States may perceive to be a matter falling within the discretion of national transfer policies. Notwithstanding, a revised ICT could seek to place certain explicit controls on licencing conditions e.g. to ensure that such terms and conditions are reasonable and proportionate to the transfer in question. Conversely, there has been some minimum harmonisation of information required of suppliers. The ICT provides that Member States must require suppliers to provide a range of information regarding the transfer.<sup>176</sup> However, beyond this minimum, Member States can also determine additional information that may be required, again, creating potential divergences in requirements imposed.<sup>177</sup>

## 5. End-use controls

As indicated in Section 2.2.2 above, concerns regarding the illicit export of transferred goods into rogue hands or conflict zones in third countries remain a prevalent issue. This has conditioned the ICT's approach to transfers and provided the greatest scope for Member State discretion. Whilst *ex ante* controls are no longer possible through routine recourse to individual licences, even general licences retain the possibility for *ex post* controls ensuring that any export restriction on the defence good issued by the Member State of origin "follows the transferred good".<sup>178</sup> As this Section will demonstrate, it is with regard to export controls on transferred goods that the limits of the ICT's harmonisation objectives are most apparent.

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<sup>171</sup> *GRIP*, *ibid.*, suggests a potential designated module for general licences on the CERTIDER website given that this is a central information point for certification, on which see Section 6 below.

<sup>172</sup> In the UK, for example, most OGELs require the exporter or trader to register before making use of licences.

<sup>173</sup> For a discussion of Member State registration practices under the ICT, see *Technopolis*, *supra* note 4, Appendix K, at 160-2 and 165-7.

<sup>174</sup> This is not expressly considered in the 2016 *Evaluation Report* COM(2016) 760 final

<sup>175</sup> For instance, *GRIP* identifies French practice in which general licences have incorporated technical clauses requiring either the supplier or recipient to make specific alterations to the product before shipping it as well as specific conditions attached to each category of product. See *supra* note 7, at 36-37.

<sup>176</sup> Member States must ensure that suppliers inform: recipients of the terms and conditions of the transfer licence (including limitations relating to end-use) (Article 8(1) ICT); within a reasonable time, the competent authorities of the originating Member State of their intention to use a general licence for the first time (Article 8(2) ICT); and regularly check that suppliers keep detailed records of their transfers and determine the reporting requirements attached to the use of a licence (whether general, global or individual) (Article 8(2) ICT).

<sup>177</sup> Article 8(2) ICT. France has even reserved the right to conduct a preliminary interview with the supplier prior to transfer. See *The impact of the 'defence package' Directives on European Defence*, *supra* note 7, at 47 fn. 88. On the application of information requirements, see *Technopolis*, *supra* note 4, Appendix K, at 163.

<sup>178</sup> *Impact Assessment*, *supra* note 6, at 41.

### 5.1. *Limitations prior to transfer*

The ICT provides that Member States may not only include any limitations on exports to third countries in their transfer licences but may also “avail themselves”, i.e. positively take advantage, of the possibility to request end-use assurances including end-use certificates.<sup>179</sup>

As indicated in Section 2.2. above, the ICT does not intend to impact on Member States’ export control policies. Member State export measures are, however, to some extent, guided by the EU Council Common Position 2008/944/CFSP defining common rules governing military exports including a User Guide indicating best practice on the use of end-user certificates (“EUCs”). However, end-use obligations and documentation currently vary greatly.<sup>180</sup> Member States continue to require EUCs for individual and global licences.<sup>181</sup> By contrast, Member States do not seem to require EUCs for transfers under a general licence but do generally include certain end-use restrictions such as non-re-export clauses, notification requirements, and clauses requiring components to be integrated.<sup>182</sup> Member States also impose a range of post-shipment controls such as delivery verification certificates (“DVCs”) and end-use monitoring.<sup>183</sup> Ultimately, most Member States wish to maintain end-use controls for both third country exports and intra-Union transfers. A significant reason is that Member States have pre-existing commitments under international control regimes concerning controls on end-use. Further, there is still a concern that export policies “vary quite widely” among Member States and which might constitute a risk where an importing Member State is an intermediary for export of transferred goods to a third country.<sup>184</sup>

At the very least, it is arguable that the ICT fails to sufficiently distinguish between intra-Union transfers which do not involve exports to third countries and those which do. For instance, Article 4(8) provides that Member States must not impose any export limitations for components where the recipient provides a declaration of use that the components are, or are to be, integrated into its own products and cannot at a later stage be transferred or exported as such, unless for the purposes of maintenance or repair.<sup>185</sup> However, Member States may impose export limitations if the transfer of components is determined to be “sensitive” (Article 4(7) ICT). As indicated in Section 4.3.2 above, distinguishing between sensitive and non-sensitive transfers may prove difficult for the purposes of determining which licence a product should be subject to, let alone whether a transfer should be subject to export limitations.<sup>186</sup> This raises further questions as to whether “sensitivity” is an effective criterion for application in this context.

Some Member States have indicated that controls on intra-Union transfers could be less restrictive than controls on exports. Whilst there is continued support for global and individual licence transfers to retain EUC requirements, a majority of Member States are in favour of their harmonisation. The difficulty at this stage is that Member States do not have a

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<sup>179</sup> Article 4(6) ICT. This language is arcane and should be clarified in a subsequent revision of the ICT.

<sup>180</sup> *GRIP*, *supra* note 7, at 54-56.

<sup>181</sup> *Ibid.*, at 55 and 60.

<sup>182</sup> *GRIP*, *supra* note 7, at 56-57 observes that a non-re-export clause is always included. Some clauses prohibit re-export without prior written authorisation by the original exporting country. Some also permit re-export without prior authorisation to certain allied third countries.

<sup>183</sup> *Ibid.*, at 58-59. Several Member States do not require DVCs for transfers within the EU and, where required, these are only used under individual licences: *ibid.*, at 58.

<sup>184</sup> *GRIP*, *supra* note 7, at 59.

<sup>185</sup> See also Recital 19 ICT. Member State practice indicates that general licences may incorporate integration clauses or declarations, or statements certifying to this effect and that certain Member States have used these sorts of statements as an alternative to the use of a non-re-export clause: *GRIP*, *supra* note 7, at 36.

<sup>186</sup> Whilst as indicated in Section 4.3.2., the ICT does not include any guidance regarding the sensitivity of products, Article 4(7) identifies two criteria for determining sensitivity: (a) the nature of the components and any end-use of the finished products which might give rise to concern; and (b) the significance of the components in relation to the products in which they are to be incorporated.

common vision of what form this would take and continue to express concern regarding the need for a case-by-case assessment in light of the diversity of end-use(r)s.<sup>187</sup> An open question is whether, in cases in which an end-user is a certified company receiving products under a general licence without prospect of export, any end-use guarantee should be considered disproportionate. In other words, certification itself might be considered the equivalent of an end-use guarantee.<sup>188</sup> However, this equivalence may be questioned on the basis that, as will be discussed in Section 6 below, certification simply provides a determination that a company is reliable i.e. has capacity to observe export limitations on products transferred under a general licence.<sup>189</sup> Certification is not a legal guarantee that specified goods will not be exported. Therefore, it remains unclear whether further revision to the certification regime could more clearly differentiate between intra-EU transfers which do not involve exports and intra-EU transfers which do involve exports to third countries.

## 5.2. *Limitations prior to export*

Corresponding to the limitations placed on transfers through the imposition of terms and conditions and end use obligations on licences regarding export, Article 10 ICT requires recipients of transferred products to declare to their competent authorities that they have complied with any export limitations attached to the licence,<sup>190</sup> including having obtained the required consent from the originating Member State. However, it is argued that because it is the recipient's responsibility to declare and inform their authority, the ICT lacks any systematic means by which receiving Member States are routinely informed about relevant re-export conditions.<sup>191</sup> Consequently, the ICT fails to safeguard against the risk of unauthorised export in cases where recipients intentionally or inadvertently neglect to inform their authorities.<sup>192</sup> The Commission had originally considered an IT traceability database that would track licences and export restrictions but this option was considered to be less cost-efficient than the information requirements finally adopted.<sup>193</sup>

Notwithstanding this uncertainty, Article 10 ICT is not the only available safeguard. Firstly, Member States may withdraw, suspend or limit the use of licences issued at any time on four grounds: protection of their essential security interests; public policy; public security; and non-compliance with licence terms and conditions: Article 4(9) ICT. Secondly, as indicated in Section 6 below, certification is one means of addressing export control concerns. Thirdly, a licencing Member State may provisionally suspend a general licence where there is a "serious risk" that a certified recipient will not comply with a licence condition, or that public policy, public security or its essential security could be affected: Article 15(1) and (2) ICT. Fourthly, the ICT contains provisions on customs procedures to ensure a further final check on exports: Article 11(1) ICT. Finally, Member States may lay down penalties for infringements, in particular, in the event of false or incomplete

<sup>187</sup> *GRIP*, *supra* note 7, at 60-61. This also means that harmonisation of post-shipment controls is currently "inconceivable".

<sup>188</sup> *Ibid.*, at 60 reporting that only one Member States expressed this opinion and that: "it should be underlined here that this understanding of the certification as an alternative to the EUC is not a shared interpretation among Member States. However, this issue should definitely be discussed among Member States."

<sup>189</sup> The authors are grateful to Baudouin Heuninckx for this observation.

<sup>190</sup> Recitals 34, 35, 36 and Article 10 ICT. This corresponds with a prior obligation to ensure that suppliers inform recipients of end-use or export limitations. See Recital 31 and Article 8(1) ICT.

<sup>191</sup> Taylor, EC Defence Equipment Directives, Standard Note SN/IA/4640 3 June 2011, House of Commons Library, 20 citing at fn. 49 Committee on Arms Export Controls, *Scrutiny of Arms Export Controls 2009*, HC 178, Session 2008-09.

<sup>192</sup> *Ibid.*

<sup>193</sup> *Impact Assessment*, *supra* note 6, at 47.

information provided concerning compliance with export limitations.<sup>194</sup> It is important that these provisions do not create divergent national practices on compliance and sanctioning.

## 6. Certification

It is recalled from Section 4.3.1 above that the ICT requires Member States to use general licences where the recipient is a certified undertaking: Article 5(2)(b) ICT. Thus, the introduction of a certification regime is the second fundamental innovation of the ICT.<sup>195</sup> Certification concerns the assessment of the reliability of a prospective recipient of defence-related products under a general licence. Certification is conducted in the Member State in which the recipient is registered according to common criteria before any transfer takes place. The principal rationale is to ensure, in particular, the capacity of the recipient to comply with export limitations placed on transferred products.<sup>196</sup> Certain Member States operated their own national certification systems before the ICT.<sup>197</sup> However, the need for common principles and mutual recognition required existing national processes to be overhauled.

### 6.1. *Optional certification and mutual recognition*

The legislator decided to establish a regime based on optional rather than mandatory certification.<sup>198</sup> One significant argument against mandatory certification concerned the need for undertakings to weigh the costs and benefits in light of the manageable but still considerable certification costs.<sup>199</sup> The ICT singles out the potential for certification to benefit transfers within a group of undertakings where members of the group are certified in their respective Member States of establishment.<sup>200</sup> At the very least, optional certification may incentivise Member States to grant general licences in light of the guarantees provided by certified reliability.<sup>201</sup> It may also foster the conditions for mutual trust leading to mutual recognition of certificates attesting reliability. For instance, Article 9(6) ICT provides that Member States must recognise any certificates issued in another Member State.

### 6.2. *Competent authorities*

Article 9(1) ICT requires Member States to designate competent authorities to certify recipients on their territory under general licences published by other Member States. The fact that, prior to the ICT, departments other than defence (e.g. ministries of industry or economy) were often in charge of certification was an argument against the adoption of a transfer regime under the auspices of the European Defence Agency (EDA) which is seen as an agency of Member States' ministries of defence.<sup>202</sup> At present, the fact that certification is optional may reduce any appetite among Member States for the centralisation of certification under a unit within the Commission or the EDA, for example. However, the certification regime is already undergoing a process of centralisation. According to Article 9(8) ICT, Member States must publish and regularly update a list of certified recipients and inform the Commission, the European Parliament and the other Member States. Further, the Commission must make publicly available on its website a central register of recipients

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<sup>194</sup> Article 16 ICT. See also Recital 38 ICT.

<sup>195</sup> The first innovation is the move from individual to general and global licenced, discussed in Section 4 above.

<sup>196</sup> Recital 33 and Article 9(2) ICT. See also 2016 *Evaluation Report* COM(2016) 760 final, at 4, first paragraph.

<sup>197</sup> French companies must obtain a "licence for manufacturing and trading" whilst UK companies are invited to implement a "compliance programme for exporters": *Impact Assessment*, *supra* note 6, at 37.

<sup>198</sup> *Impact Assessment*, *ibid.*, at 26-27 and 37-40.

<sup>199</sup> Data collected during the consultation phase from stakeholders suggests annual costs of about €10,000.00 per company: *Impact Assessment*, *supra* note 6, at 38-40. See also Recital 32 ICT.

<sup>200</sup> See Recital 3 ICT.

<sup>201</sup> *Impact Assessment*, *supra* note 6, at 40.

<sup>202</sup> *Ibid.* at 18. See also *Transposition Report*, *supra* note 7, at 10.



certified by Member States and has created a central register for this purpose.<sup>203</sup> In the long-term, the arguments for and against further centralisation under an EU institution could be explored as a means to build further trust beyond mutual recognition.

### 6.3. *Certification criteria, certification and publication*

As indicated, the ICT introduces what appears to be exhaustive common certification criteria to establish the recipient's reliability.<sup>204</sup> The ICT also prescribes the minimum mandatory information to be contained in certificates (Article 9(3)(a)-(d) ICT). Member States may also provide that certificates contain further conditions relating to the provision of information required to verify compliance with the reliability criteria and concerning suspension or revocation of the certificate (Article 9(4) ICT). In addition, authorities must monitor the recipient's compliance with the criteria and any further conditions at least every three years.<sup>205</sup> Finally, the validity of a certificate must not exceed five years (Article 9(3) paragraph 2 ICT). Therefore, notwithstanding common certification criteria, it is unclear whether Member States may: issue certificates for less than five years up to the maximum; differ in terms of the nature and level of information required to verify compliance; and monitor compliance more often than every three years.

To ensure further convergence in the applicable certification criteria, the Commission has published Recommendation 2011/24/EU<sup>206</sup> setting out common certification guidelines; however, these may, in fact, create further diversity of national measures contrary to the ICT's intended objectives. The guidelines not only amplify existing provisions but also leave scope for Member States to add further requirements, the proportionality of which might be questioned. It is not clear what has motivated a non-legally binding instrument; perhaps the most likely reason is the fact that certification is optional. Whatever the reason, the Recommendation was not specifically envisaged or enabled by the ICT. Section 6.5 below questions the continuing emphasis on such soft-law guidance in furthering harmonisation.

### 6.4. *Non-compliance*

If a competent authority determines that a certified recipient on its territory is no longer compliant, it must take "appropriate measures", which may include suspension or revocation of the certificate: Article 9(4)(b) and (7) ICT. Uncertainty in determining what might constitute non-compliance and appropriate action may result in authorities simply opting for automatic revocation or suspension without considering less severe corrective measures. There is no provision in the ICT for Member States to achieve a relative degree of uniformity in approach, other than an obligation to inform the Commission and other Member States of the decision taken: Article 9(7) ICT. Recommendation 2011/24/EU provides some indication

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<sup>203</sup> The Commission's Register of Certified Defence-related Enterprises (CERTIDER) <http://ec.europa.eu/growth/tools-databases/certider/index.cfm> [last visited 30 January 2017] provides information about enterprises certified under the ICT, contains a list of the competent national authorities designated to deal with certification, the list of certified enterprises, details about the certificates and links to relevant national legislation. According to *GRIP*, most but not all Member States refer to the EU's list of certified recipients and several Member States specifically require the supplier to verify, on the EU website, whether the beneficiary holds a valid certificate (*GRIP*, *supra* note 7, at 33 indicating, however, that the UK authorities refer to a list of certified companies available on a UK website). It is submitted that a guidance note or a revised ICT could specify that all references should refer to the EU list of certified recipients.

<sup>204</sup> These include *inter alia*: experience of, and compliance with, export restrictions See Article 9(2)(a)-(f) ICT.

<sup>205</sup> Article 9(5) ICT. This provides an additional safeguard to that provided in Article 8(3) ICT which requires Member States to regularly check that suppliers keep detailed and complete records of their transfers.

<sup>206</sup> Commission Recommendation 2011/24/EU of 11 January 2011 on the certification of defence undertakings under Article 9 of Directive 2009/43/EC of the European Parliament and of the Council simplifying terms and conditions of transfers of defence-related products within the Community [2011] OJ L11/62. The Recommendation was developed by the working group under the Committee procedure in Article 14 ICT.

as to how to proceed in assessing non-compliance, appropriate measures and determinations and time limits regarding the lifting, maintaining or revoking of suspensions.<sup>207</sup> On issues that might be considered to fall within national procedural autonomy, principles of proportionality and effective judicial protection will need to provide a residual safeguard.

#### 6.5. *Transposition, implementation, and impact*

According to the latest study, all Member States have defined their national certification systems in compliance with the ICT.<sup>208</sup> However, there has been a limited uptake in practice.<sup>209</sup> Firstly, companies, in particular, SMEs, express “serious doubts” about the benefits of certification given the time, risks, potential for intellectual property and security breaches and organisational and financial requirements necessary to prepare procedures, controls and audits for compliance.<sup>210</sup> Secondly, there are potentially unknown costs and risks. For example, concern has been expressed regarding the certification criterion which requires a senior officer to be personally responsible for transfers and exports.<sup>211</sup> These are exacerbated by the uncertain scope of application of general licences as well as the fact that it is not mandatory to publish licences and certifications in a common language such as English.<sup>212</sup> Thirdly, in certain Member States a certificate may be limited in its scope e.g. to receive only certain categories of products.<sup>213</sup> Overall, only 55 enterprises have been certified, half of which are located in just two Member States.<sup>214</sup> Further, only six per cent of applications for registration to use general licences relate to certified recipients.<sup>215</sup>

The study supporting the Commission’s *Evaluation Report* recommended, and the 2016 *Evaluation Report* considers, the future introduction of detailed implementation guides on certification based on the Recommendation.<sup>216</sup> Equivocally, it is stated that these guides should be implemented in the form of a “non-mandatory accompanying procedure” that is “outside of the Directive” and which is to be preferred because it would take less time to negotiate than guidelines “linked directly to the directive”.<sup>217</sup> Conversely, it is argued that further soft-law guidance unaccompanied by legal reform may have the opposite effect of leading to even more variable implementation. The co-existence of a legally binding instrument and a non-legally binding Recommendation need not compromise legal certainty if the latter is a principled amplification of the former. However, it should not be a substitute for inadequate legal provision in the ICT, which is arguably the case at present. The 2016 *Evaluation Report* is accompanied by a further Recommendation regarding certified

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<sup>207</sup> See, for example, Section 4(4.1) and Section 4(4.3.).

<sup>208</sup> *Technopolis*, *supra* note 4, at 35. See also: SWD(2016) 398 final/2, at 21-22. COM(2016) 760 final, at 4, however, points out that one Member State “is yet to introduce a fully operable scheme for certifying defence enterprises” and that “[n]o complete information is available for all Member States” on this matter.

<sup>209</sup> *GRIP*, *supra* note 7, at 43 and COM(2016) 760 final, at 4, 5, 6, 9, and 11, which points out at 10 that certification is the only issue for which there was sufficient data.

<sup>210</sup> *Technopolis*, *supra* note 4, at 40 and 44; COM(2016) 760 final, at 6 and 9; SWD(2016) 398 final/2, at 23.

<sup>211</sup> Thanks to Mr. Ian Bendelow for discussing the extent to which this is an issue within the export community as compliance programmes become increasingly sophisticated, although this was not expressed as a UK specific concern. See also *GRIP*, *supra* note 7, at 44 and the COM(2016) 760 final, at 6.

<sup>212</sup> According to *GRIP*, *ibid.*, at 46, the administrative burdens and lack of information on general licences led some SMEs to use individual and global licences. Conversely, the latest report indicates that SMEs represent 63 per cent of users of general licences for transfers to certified recipients. *Technopolis*, *supra* note 4, at Appendix G, at 117. On cost versus benefit generally, see *Technopolis*, *ibid.*, at 35 and Appendix K, at 175.

<sup>213</sup> *Ibid.*, Appendix K, at 153.

<sup>214</sup> *Technopolis*, *supra* note 4, at 173. See also COM(2016) 760 final, at 6 referring to Germany and France. Half of the Member States have no certified companies. According to SWD(2016) 398 final/2, at 23 the estimated number of certified enterprises is 53.

<sup>215</sup> *Technopolis*, *ibid.*, at 114.

<sup>216</sup> *Technopolis*, *supra* note 4, at 81 and Appendix K, at 154 and COM(2016) 760 final, at 11.

<sup>217</sup> *Technopolis*, *ibid.*, at 81 and Appendix K, at 154.

companies<sup>218</sup> discussed in Section 3 above. It also identifies proposals for guidance on certification in future, in addition to even softer approaches such as a handbook, outreach in network meetings, and expanding CERTIDER.<sup>219</sup> However, whilst the *Evaluation Report* identifies the possibility of “revising the certification scheme” in the “longer run”, it provides no indication of its potential based on the current legal configuration of the scheme.<sup>220</sup> Caution must be exercised against substantially extending the certification provisions given the ICT’s minimum harmonisation objective, the fact that certification is optional as well as the fact that the very purpose of certification is to reduce regulatory controls as a complement to general licences. Notwithstanding, clarification and slight expansion of the certification provisions could encourage an uptake in general licences.<sup>221</sup>

## 7. Conclusions

The ICT is an important weapon in the “Defence Package”, cutting through the fog of hazy claims that national security always justifies licencing. Whilst it is possible to debate the extent to which legitimate security risks arise from intra-EU transfers, they pose a substantially lesser risk than third country exports. The ICT’s main innovations are: (1) a transition away from individual licences towards general licences with defence products defined by the CML and subject to reduced *ex ante* controls; (2) certification of recipients; and (3) *ex post* controls on third country exports. This article has argued that an ambivalent approach to harmonisation has contributed significantly to the ICT’s limited operational effectiveness. The borderline between optional exemption from prior authorisation and mandatory licences is unclear as is the co-existence of legally and non-legally binding instruments. Moreover, Member States still determine their transfer and export control policies. Consequently, an overriding export control mentality is pervasive, as evidenced by continuing preference for individual licences and restrictively defined general licences. The certification regime is similarly unclear. Legal reform is necessary to achieve minimum harmonisation in preference to further harmonisation exclusively through soft law.

However, it is important to acknowledge the difficulties at present. The 2016 evaluation, required by Article 17 ICT, only draws on a few years’ practice; the Commission was, perhaps, understandably reluctant to propose legal reform even though the evaluation is intended to provide the basis for a legislative proposal, if necessary.<sup>222</sup> Therefore, the issues so far identified provide institutional learning for future revisions and should not be taken as an indication of its failure. More fundamentally, the exercise of EU competence renders the ICT susceptible to the same kinds of difficulties encountered when exercising any new competence for the first time: legislators and stakeholders must adapt, and mutual trust and recognition only grow over time. At the current stage of EU defence integration, intra-EU transfers are still considered to present security risks which legitimate certain controls. Over time, Member States need to ensure that licencing decisions are a true reflection of risk. Whilst a licence-free Europe may never be possible, the ICT, backed with institutional support, may lead to a quasi-Internal Market for defence goods with fewer licences.

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<sup>218</sup> C(2016) 7728 final.

<sup>219</sup> COM(2016) 760 final, at 11 and 12.

<sup>220</sup> COM(2016) 760 final, at 12-13.

<sup>221</sup> Just one example would be clarity around the requirement for a designated officer to be “personally responsible”, which, at present is only likely to make authorities even more risk averse.

<sup>222</sup> COM(2016) 760 final, at 2: “only three years after the transposition deadline [it is] difficult to assess whether the long-term objectives of the Directive have been achieved.” See also SWD (2016) 398 final/2, at 6 and 13.